

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

OLEN MAFFETT POUND,  
d/b/a Coles Point Marina,

Plaintiff

V.

No. 2:92CV100-B-B

HULL & COMPANY, INC., et al.

Defendants

Memorandum Opinion

This cause comes before the court on the motion for default judgment filed by counterplaintiffs Hull & Company, Inc. [Hull], Excess Insurance Company, Ltd., Phoenix Assurance, P.L.C., Ocean Marine Insurance Company, Ltd., Sovereign Marine and General Insurance Company, Ltd., Norwich Union Fire Insurance Society, Ltd., Prudential Assurance, P.L.C., Cornhill Insurance, P.L.C, and Allianz International Insurance Company, Ltd. [the Insurers].<sup>1</sup> Plaintiff/counterdefendant Pound failed to appear for the second trial<sup>2</sup> set to begin on April 14, 1997. On April 16, 1997 the complaint was dismissed with prejudice for lack of prosecution and a default was entered against counterdefendant Pound on the counterclaims for fraud in the inducement. Hull filed a counterclaim<sup>3</sup> alleging that Pound's fraudulent and intentional misrepresentations of fact in his insurance application induced Hull to broker the subject policy. The counterclaim alleged consequential damages Hull suffered as a result of the

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<sup>1</sup>The court notes a discrepancy between the Insurers' answer and the instant motion, as well as the entry of default, with respect to the names of four of the Insurers. The answer identifies the subject insurers as Excess Insurance Company, Ltd., Norwich Union Fire Insurance Society, Ltd., Prudential Assurance P.L.C., and Cornhill Insurance, P.L.C. whereas the entry of default and the instant motion identify these insurers as Excess Insurance Company, Norwich Union Fire Insurance Company, Ltd., Prudential Insurance Company, Ltd., and Cornhill Insurance, P.L.D. The court presumes the discrepancy reflects typographical errors.

<sup>2</sup>The court declared a mistrial following a jury trial held on October 23, 1995 through October 26, 1995.

<sup>3</sup>On August 19, 1992 Hull and Company, Inc., the original defendant, filed an answer to the complaint and a counterclaim alleging fraud in the inducement. On December 3, 1992 plaintiff/counterdefendant Pound filed an amended complaint adding the Insurers as defendants. On January 5, 1993 Hull and Company, Inc. filed an answer to the amended complaint and a counterclaim for fraud in the inducement.

alleged fraudulent representations, including the expenses and attorneys' fees incurred in defending this cause. The Insurers filed a separate counterclaim<sup>4</sup> alleging that Pound's fraudulent and intentional misrepresentations of fact induced the Insurers to issue the subject policy. The Insurers' counterclaim similarly alleged consequential damages suffered as a result of the alleged fraudulent representations, including attorney's fees and expenses incurred in defending this cause.<sup>5</sup> The counterplaintiffs move for default judgment on their counterclaims.

Counterdefendant Pound did not respond to the instant motion. A party by his default admits "well-pleaded allegations of fact." Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5<sup>th</sup> Cir. 1975). Litigation expenses and attorney's fees are recoverable as actual damages upon proof of "maliciousness, insult, or fraud required by Mississippi law to warrant punitive damages." Guaranty Service Corp. v. American Employers' Ins. Co., 898 F.2d 453, 454-55 (5<sup>th</sup> Cir. 1990) (construing Mississippi law) (insurer's counterclaim for actual damages, including attorney's fees and investigation expenses, and punitive damages alleged that the insured misrepresented repair costs and concealed a low estimate). Pound's default constitutes an admission of the alleged fraudulent misrepresentations. In re Dierschke, 975 F.2d 181, 185 (5<sup>th</sup> Cir. 1992) ("a default operates as a deemed admission of liability"). Since Pound is liable for fraud in the inducement, the court finds that a default judgment for actual damages should be entered in favor of the counterplaintiffs.

The remaining issue is the amount of damages to be awarded. The counterplaintiffs seek an award of attorney's fees and expenses "incurred as a direct result of [Pound's] misrepresentation on the application which resulted in the issuance of the policy in issue." The itemizations, set forth in exhibit C, reflect attorney's fees in the sum of \$43,321.00 for services

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<sup>4</sup>On February 17, 1993 the Insurers filed a separate answer to the amended complaint and counterclaim.

<sup>5</sup>In addition, the counterclaims alleged that the complaint and amended complaint were filed without a basis in law or fact and requested an award of fees and expenses as sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. §1927.

rendered by five attorneys and expenses in the sum of \$10,735.10.<sup>6</sup>

In awarding attorney's fees, the court must arrive at a "lodestar" figure by multiplying the reasonable number of hours expended by the prevailing hourly rate in the community for similar work. Nisby v. Commissioners Court of Jefferson County, 798 F.2d 134, 136-137 (5th Cir. 1986). The court must then consider the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), overruled on other grounds, Blanchard v. Bergeron, 489 U.S. 87, 103 L.Ed.2d 67 (1989),<sup>7</sup> to determine whether the lodestar figure should be adjusted to reflect any factors not otherwise subsumed in the lodestar calculation. Nisby, 798 F.2d at 136-137. Neither the time expended nor the hourly rates is disputed. By not contesting the counterplaintiffs' fee request, Pound, in effect, admits the validity of the requested amount.<sup>8</sup> See Transamerica Ins. Co. v. Avenell, 66 F.3d 715, 722 (5th Cir. 1995); United States v. Con-Real Support Group, Inc., 950 F.2d 284, 290 (5th Cir. 1992). The court has reviewed the counterplaintiffs' verified invoices and finds the reported hours to be reasonably expended during a period of almost five years. The court further finds that the unopposed hourly rates are presumed to be commensurate with the prevailing rates in the community at the relevant periods of time and that the fee amount requested by the

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<sup>6</sup>The instant motion erroneously alleges that the counterplaintiffs incurred attorney's fees and expenses in the amount of \$127,074.13, as set forth in exhibit C. Exhibit C consists of statements numbered 1, 3-10 and an unnumbered statement dated March 28, 1997 totaling \$54,056.10. The counterplaintiffs are deemed to request \$43,321.00 in attorney's fees and \$10,735.10 in expenses, as itemized in Exhibit C.

<sup>7</sup> Under Local Rule 54.2(B)(3), the Johnson factors are to be considered for any fee application.

<sup>8</sup>See note 6, supra.

counterplaintiffs constitutes the appropriate lodestar amount. The court has considered the twelve factors set forth in Johnson and Local Rule 54.2(B)(3), but finds that an adjustment of the lodestar figure is not warranted.<sup>9</sup> Therefore, the court finds that the counterplaintiffs are entitled to an award of \$43,321.00 in attorney's fees.

Upon due consideration, the court finds that the counterplaintiffs' expenses are reasonable and necessary, and that the counterplaintiffs should be compensated accordingly. Therefore, the court finds that the counterplaintiffs are entitled to an award of \$10,735.10 in expenses.

An order will issue accordingly.

THIS, the \_\_\_\_ day of September, 1998.

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NEAL B. BIGGERS, JR.  
CHIEF JUDGE

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<sup>9</sup> Since neither the counterplaintiffs nor the counterdefendant has requested an adjustment of the lodestar figure, the court will not specifically address each of the twelve factors.